

Committee on the Judiciary

U.S. House of Representatives

**Subcommittee on Courts, Intellectual Property and the Internet
Hearing Memo**

**Chairman Howard Coble
Ranking Member Mel Watt**

H.R. 1123, the “Unlocking Consumer Choice and Wireless Competition Act”

**Thursday, June 6, 2013
2141 Rayburn House Office Building
10:00 a.m.**

The Subcommittee on Courts, Intellectual Property and the Internet will hold a hearing on Thursday, June 6 at 10:00 am in 2141 Rayburn to review H.R. 1123, the Unlocking Consumer Choice and Wireless Competition Act of 2013.

Witnesses

- Michael Altschul, Senior Vice President and General Counsel, CTIA The Wireless Association
- Steve Berry, CEO, Competitive Carriers Association
- Steve Metalitz, Partner, Mitchell, Silberberg, and Knupp, LLP
- George Slover, Senior Policy Counsel, Consumers Union

Background

The WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty require countries that have acceded to the Treaties to “provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures.”¹ Enacted in 1998 as part of the Digital Millennium Copyright Act, Section 1201 (a)(1) of Title 17 implements these treaty obligations in the U.S. by prohibiting circumvention of a technological protection measure (TPM) that effectively controls access to a copyrighted work subject to one key exception. Every three years, the Register of Copyrights is directed by statute to conduct a rulemaking in which advocates for specific exemptions may petition for exemptions to the anticircumvention provisions for noninfringing uses subject to five factors.²

¹ Article 11 of WIPO Copyright Treaty and Article 18 WIPO Performances and Phonograms Treaty, see Appendix A.

² See Appendix B.

Since the enactment of this provision into U.S. law, the U.S. has entered into several Free Trade Agreements that require signatories (the U.S. and the particular country or region) to enact anti-circumvention provisions and set requirements on how exceptions to them can be created. Most such FTAs limit the duration of such exemptions to a three or four year period and require that they be administratively or legislatively created based upon a record of evidence.³

In the U.S., beginning with the first rulemaking in 2000 and followed by rulemakings in 2003, 2006, 2010, and 2012, the Register of Copyrights has approved exemptions in several categories of works, not all of which have been renewed at each rulemaking. Pursuant to Congressional direction, the Copyright Office conducts each rulemaking *de novo* with no categories having an automatic right of renewal or any presumption of validity from one rulemaking to another. The *de novo* review requirement stems from House Energy and Commerce Committee report language that accompanied passage of the underlying legislation.⁴ The Copyright Office also follows the Administrative Procedures Act (APA) when conducting this rulemaking which requires that rulemakings be decided upon the record of the proceeding.

Petitions were submitted to the Register of Copyrights in 2006 and 2010 seeking a cell phone unlocking exemption and both were granted.⁵ H.R. 1123 addresses this issue and the outcome of the 2012 rulemaking process that did not include an exemption for newly purchased phones.

Cell Phone Unlocking

Cell phone unlocking refers to the process of changing the software settings on a cell phone to enable the device to work on other cell phone networks. Consumer cellular telephone services depend upon a linking between a cellular telephone handset and a cellular network provider such as AT&T, T-Mobile, Verizon, Virgin Mobile, etc. In the United States and elsewhere, cellular telephones operate on specific radio frequencies assigned to them by the Federal Communications Commission (FCC). In addition, cellular telephones operate on different technologies such as CDMA, EVDO, GSM, LTE etc. that effectively limit interoperability.

Initially as the cellular telephone industry grew, these technology differences typically led to a limited amount of interoperability of specific cellular telephone models among different carriers. As cellular telephones have become more advanced, they are increasingly able to operate on numerous carrier networks by changing internal software settings that are typically protected by TPMs.⁶ Updating these internal software settings by circumventing TPMs is at the

³ See Appendix C for one example – the U.S.- Korea Free Trade Agreement.

⁴ “[O]n each occasion, the assessment of adverse impacts on particular categories of works is to be determined *de novo*.” Report of the House Committee on Commerce on the Digital Millennium Copyright Act of 1998, H.R. Rep. No. 105-551, pt. 2, at 37.

⁵ See <http://www.copyright.gov/1201/2006> and <http://www.copyright.gov/1201/2010> for the complete record.

⁶ For example, in February 2013, Qualcomm announced a chipset that would work on 40 different cell phone bands – see <http://www.qualcomm.com/media/releases/2013/02/21/qualcomm-rf360-front-end-solution-enables-single-global-lte-design-next>

center of the policy debate concerning cell phone unlocking.

New cellular telephones have typically been sold to consumers as part of a contract, often two years in duration, in which the consumer agrees to set terms regarding monthly pricing and calling features in return for discounted pricing of the cellular telephone. Cellular network providers have used cell phone locking as one measure to ensure that consumers do not switch cellular providers without paying back the initial device subsidy.

In contrast to such contracts, pre-paid business models in which a consumer pre-pays for service, typically in monthly increments, without signing a contract or receiving any discount on the cost of the cellular telephone are growing in popularity. These services also commonly use cell phone locks as well to prevent the phone from being used on another network. In addition, there are also a growing number of new cell phones that are sold without any locks including some by major cell phone providers.

Cell phone providers operating under both business models that do lock their phones have expressed less concern about cell phone unlocking by individual consumers, in contrast to bulk unlocking by companies who may ship unlocked phones overseas to the financial detriment of U.S. cell phone companies.

The 2012 Rulemaking As It Applied to Cell Phone Unlocking

All exemptions that went into effect as part of the 2010 rulemaking automatically terminated on October 28, 2012 with the publication in the Federal Register of the most recent list of approved Section 1201 exemptions.⁷ A total of eight new exemptions were approved and went into effect on October 28, 2012 and will remain so until the publication of the next list of exemptions that is due in the October 2015 timeframe. The third exemption now states:

“(3) Computer programs, in the form of firmware or software, that enable a wireless telephone handset originally acquired from the operator of a wireless telecommunications network or retailer no later than ninety days after the effective date of this exemption to connect to a different wireless telecommunications network, if the operator of the wireless communications network to which the handset is locked has failed to unlock it within a reasonable period of time following a request by the owner of the wireless telephone handset, and when circumvention is initiated by the owner, an individual consumer, who is also the owner of the copy of the computer program in such wireless telephone handset, solely in order to connect to a different wireless telecommunications network, and such access to the network is authorized by the operator of the network.”

Unlike the traditional immediate termination of existing exemptions with the publication of the updated list every three years, this provision created a new exemption for phones that were purchased prior to January 26, 2013. This ninety day period beyond October 28, 2012 was intended to give consumers sufficient time to purchase phones that would be covered by the exemption. H.R. 1123 would reinstate the previous 2010 exemption until the next list of exemptions is announced in the October 2015 timeframe.

⁷ See <http://www.copyright.gov/fedreg/2012/77fr65260.pdf> for the Federal Register notice containing the current list of exemptions.

H.R. 1123, the “Unlocking Consumer Choice and Wireless Competition Act”

H.R. 1123 was jointly introduced on March 13, 2013 by the Leadership of the House Judiciary Committee and its Courts, Intellectual Property and the Internet Subcommittee. (Goodlatte, Conyers, Coble, and Watt) A Senate companion bill, S. 517, was introduced on March 11, 2013 and is cosponsored by the Leadership of the Senate Judiciary Committee.

Section 2(a) of H.R. 1123 reinstates the previous exemption by negating the October 2012 change and reinstating the 2009 exemption. Section 2(b) of H.R. 1123 directs the Register to undertake a new rulemaking within 12 months to determine if other cellular network capable devices should also be covered by an exemption. Although this language will be viewed by many as applicable to tablets capable of being connected to cellular telephone networks, the language of Section 2(b) applies to all wireless devices, not just tablets.

Related legislation

In addition to companion legislation (S. 517) that was introduced on March 11, 2013, H.R. 1892 was introduced on May 8, 2013 and was referred to the House Judiciary Committee. Section 3 of H.R. 1892 addresses issues related to the unlocking of cell phones and other similar devices. Section 1 and 2 of H.R. 1892 address broader anticircumvention issues beyond cell phones and other similar devices. Two related Senate bills were also introduced on March 6, 2013 by Senator Wyden (S. 467) and Senators Klobuchar, Lee, and Blumenthal (S. 481). S. 467 was referred to the Senate Judiciary Committee while S. 481 was referred to the Senate Commerce Committee. In addition to changes in U.S. copyright law, advocates for cell phone unlocking have urged the FCC to enact cell phone unlocking regulations. This approach is the one taken by S. 481.

Issues

- What is the impact of locked and unlocked phones upon consumers and the marketplace?
- How should concerns with bulk unlocking of cell phones be addressed?
- What other devices besides cell phones are included in the scope of H.R. 1123?
- How existing Free Trade Agreements limit the duration of any exemptions?

For any questions, contact Joe Keeley (Majority) at 5-5741 or Stephanie Moore (Minority) at 5-6906.

Appendix A

WIPO Copyright Treaty

Article 11 Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law.

WIPO Phonograms and Performances Treaty

Article 18 Obligations concerning Technological Measures

Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by performers or producers of phonograms in connection with the exercise of their rights under this Treaty and that restrict acts, in respect of their performances or phonograms, which are not authorized by the performers or the producers of phonograms concerned or permitted by law.

Appendix B

17 U.S.C. § 1201. Circumvention of copyright protection systems

(a) Violations Regarding Circumvention of Technological Measures. —

(1)(A) No person shall circumvent a technological measure that effectively controls access to a work protected under this title. The prohibition contained in the preceding sentence shall take effect at the end of the 2-year period beginning on the date of the enactment of this chapter.

(B) The prohibition contained in subparagraph (A) shall not apply to persons who are users of a copyrighted work which is in a particular class of works, if such persons are, or are likely to be in the succeeding 3-year period, adversely affected by virtue of such prohibition in their ability to make noninfringing uses of that particular class of works under this title, as determined under subparagraph (C).

(C) During the 2-year period described in subparagraph (A), and during each succeeding 3-year period, the Librarian of Congress, upon the recommendation of the Register of Copyrights, who shall consult with the Assistant Secretary for Communications and Information of the Department of Commerce and report and comment on his or her views in making such recommendation, shall make the determination in a rulemaking proceeding for purposes of subparagraph (B) of whether persons who are users of a copyrighted work are, or are likely to be in the succeeding 3-year period, adversely affected by the prohibition under subparagraph (A) in their ability to make noninfringing uses under this title of a particular class of copyrighted works. In conducting such rulemaking, the Librarian shall examine —

- (i) the availability for use of copyrighted works;
- (ii) the availability for use of works for nonprofit archival, preservation, and educational purposes;
- (iii) the impact that the prohibition on the circumvention of technological measures applied to copyrighted works has on criticism, comment, news reporting, teaching, scholarship, or research;
- (iv) the effect of circumvention of technological measures on the market for or value of copyrighted works; and
- (v) such other factors as the Librarian considers appropriate.

(D) The Librarian shall publish any class of copyrighted works for which the Librarian has determined, pursuant to the rulemaking conducted under subparagraph (C), that noninfringing uses by persons who are users of a copyrighted work are, or are likely to be, adversely affected,

and the prohibition contained in subparagraph (A) shall not apply to such users with respect to such class of works for the ensuing 3-year period.

(E) Neither the exception under subparagraph (B) from the applicability of the prohibition contained in subparagraph (A), nor any determination made in a rulemaking conducted under subparagraph (C), may be used as a defense in any action to enforce any provision of this title other than this paragraph.

Appendix C

U.S. Korea Free Trade Agreement

Chapter 18, Intellectual Property Rights⁸

(d) Each Party shall confine exceptions and limitations to measures implementing subparagraph (a) to the following activities, which shall be applied to relevant measures in accordance with subparagraph (e):

.....

(viii) noninfringing uses of a work, performance, or phonogram in a particular class of works, performances, or phonograms when an actual or likely adverse impact on those noninfringing uses is demonstrated in a legislative or administrative proceeding by substantial evidence, provided that any limitation or exception adopted in reliance on this clause shall have effect for a renewable period of not more than three years from the date the proceeding concludes. (*Committee emphasis added*)

⁸ See page 10-11 of

http://www.usit.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file273_12717.pdf.